

1879

IN THE

United States Court of Appeals  
FOR THE NINTH CIRCUIT

STERLING EDWARD NEWCOMB,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

OPENING BRIEF ON APPEAL.

FILED

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### Statement of the Pleadings.

By Indictment No. 31075, Appellant, along with David Anthony Harding and William Herbert Brining, was charged in Counts 1 and 5 of violation of 18 U. S. Code Section 471.

They were further charged in Counts 3, 4, 6 and 7 of violation of 18 U. S. Code Section 474. [1 C. T. pp. 2-8.]

### Statement of the Case.

Appellant, along with the co-defendants, moved the court for suppression and exclusion of all counterfeit currency, plates, equipment, paraphernalia, papers, and all other articles and physical objects which on or about June 28, 1962 at the premises located at 3300 Atlantic Boulevard, Long Beach, California, which were unlawfully siezed and removed from said premises by agents

of the United States, and that the enumerated items be suppressed and excluded as evidence against said defendant.

Said motion was based upon the grounds that said items were illegally seized by means of an unlawful breaking into said premises by said agents against the will of appellant and without a search warrant; that the search and seizure were not an incident to a valid arrest, nor did said agents possess a warrant for appellant's arrest; that appellant's arrest was illegal; that there existed no probable cause to justify the illegal search and accompanying seizure of said items without a search warrant nor the arrest of appellant. [1 C. T. p. 19; 5 R. T. pp. 4 and 5.]

The hearing on said motion, originally scheduled for September 10, 1962 [1 C. T. p. 18], was continued to October 8 and 9, 1962 at which time evidence was introduced concerning the motion. [5 R. T.]

The matter was then taken under submission, and set down for ruling on October 15, 1963, at which time appellant's motion was denied. [1 C. T. pp. 38-40.]

The matter was continued for trial from time to time, on each occasion appellant renewing his objections to the introduction of evidence and renewing his motion to suppress the evidence.

Jury trial commenced March 12, 1963, and prior to the actual trial appellant moved the court to reconsider its ruling [2 R. T. p. 5], in order that there would not be a waiver of appellant's objection [2 R. T. p. 8, lines 13-19], and that the introduction of any counterfeit items at the trial would be deemed objected to, to which the court and government counsel agreed. [2 R. T. pp. 7-11.]

The objects seized on June 28, 1962 were admitted into evidence, and appellant was convicted on Counts 1, 3, 4, 5, 6 and 7 as charged in the Indictment. [1 C. T. p. 49.]

On April 15, 1963 Judgment was entered and sentence imposed against appellant the sentence being 5 years on each count, the sentences on all counts to run concurrently. [1 C. T. p. 50.] The two co-defendants were eventually acquitted.

Notice of Appeal was timely filed and the matter is now before this court [1 C. T. pp. 51-53], this court having jurisdiction of appeals from final decisions of the United States District Court pursuant to 28 U. S. C. 1291.

### Statement of Facts.

(All of the references cited refer to the Second Supplemental Reporter's Transcript of proceedings had on October 8 and 9, 1962, and filed with this Honorable Court on August 19, 1963.)

It was stipulated that the government agents had neither a warrant for the arrest of either Newcomb or Brining nor a warrant to search the premises in which the contraband was discovered. [R. T. p. 6, lines 7-22.]

Kenneth Thompson, United States Secret Service Agent met an individual on June 27, 1962 at Stan's Playroom in the town of Maywood, California. [R. T. p. 10, lines 1-22, p. 23, lines 18-21.] Thompson had never met nor used this informant before, nor was he designated as a reliable informant by any other agent. [R. T. p. 27, line 14, to p. 28, line 12.] Another agent, Bill Sheridan, informed Thompson that an in-

dividual had telephoned the day before having knowledge of a counterfeiting operation in the Long Beach area, so Sheridan arranged the rendezvous between the individual and Thompson. [R. T. p. 29, line 2, to p. 30, line 2.]

The individual informed agent Thompson that the three defendants were counterfeiting ten dollar bills at Precision Products Company, 3330 S. Atlantic Ave. in Long Beach; that the company was engaged in the sale of doors, window sills, plywood and other construction items. He further described the vehicles each were driving, the address of David Harding, and the police record of Newcomb and Harding. [R. T. p. 10, line 23, to p. 12, line 12.] He further advised Thompson that Brining lived on Brookshire in Downey and that the exact address could be obtained from the telephone book, which Thompson verified from the telephone directory. They were not able to obtain the street number of Harding's address. He further informed Thompson that Newcomb and Harding had an apartment at 24 Sixth Place in Long Beach. The vehicle registrations were verified through the Department of Motor Vehicles as being registered to the respective defendants. [R. T. p. 12, line 13, to p. 14, line 18.]

On Cross-examination appellant inquired as to the name of the informant, whereupon the government objected and claimed a privilege not to disclose the identity of the informant, claiming he was a reliable informant. The government made no showing of any kind on what basis they wished to keep the informant's identity from being revealed. Further cross-examination established that this informant's reliability had not been established by his furnishing prior in-



formation. [R. T. p. 24, line 4, to p. 28, line 12.] The court then sustained the objection and permitted the government not to disclose the informant. [R. T. p. 39, lines 6-8.]

Appellant then inquired, "Mr. Thompson, did this informer tell you that he had seen any paraphernalia, plates, or counterfeit money, at the premises owned by Mr. Newcomb?" [R. T. p. 38, lines 9-11], to which the government objected. Although the court overruled their objection on two occasions [R. T. p. 38, line 18; p. 14, line 14], the government kept refusing to accept the ruling and presented a lengthy argument to the court, wherein the U. S. Attorney stated, "The government agrees that this man does not have any prior or previous reliability as far as the government is concerned;" [R. T. p. 43, lines 13-15], yet pressed the objection on the basis of the question being immaterial.

In reply appellant stated,

"This afternoon counsel has presented a heretofore unknown principle of law, that where a person testified to material information on direct examination that the defendant should be precluded from cross-examining.

We are not asking whether this informant had a conversation with Mr. Thompson about movies or baseball or anything else than directly connected with the activities of my client, Mr. Newcomb.

He testified on his direct examination as to a conversation with that informant. I am entitled by any objective standards to go into that conversation relating to the transaction, the activities going on at 3330 Long Beach Boulevard, and in-

volving Mr. Newcomb, definitely.” [R. T. p. 45, line 15, to p. 46, line 2.]

The objection was eventually sustained by the court [R. T. p. 55, lines 11-25], and appellant was not permitted to discover the basis on which the informant arrived at his conclusion.

At approximately 9:00 P.M. on the evening of June 27, 1962 agent Thompson, Weaver and Sheridan drove to the apartment at 24 Sixth Place in Long Beach, where they observed Newcomb and Brining moving a cardboard box onto Brining's truck, which Brining drove away. They neither followed either of the two defendants to the apartment, their names were not found on the mail box, nor did the agents inquire of the apartment manager as to whether they resided there. [R. T. p. 14, line 15, to p. 15, line 22; p. 58, line 4, to p. 60, line 2.]

During the latter part of that afternoon agent Darwin Horn telephoned Carpenter's Printing Company speaking to Ray Blair, inquiring as to whether there were any records of paper purchases by Precision Products of Long Beach. After the company records were checked Floyd Ellis called him back and stated that Mr. Newcomb of Precision Products had made purchases of several types of paper on various dates, on May 11th purchasing 1000 sheets of 8½x11 No. 20 Lancaster, 100 per cent rag bond paper. This type of paper closely approximated the paper used in U. S. currency stock. [R. T. pp. 137-145.]

At 8:00 A.M. the following morning agents Thompson and Sheridan arrived at Precision Products and placed the building under surveillance, agents Weaver

and Horn having arrived approximately a half hour earlier. Newcomb's car was parked in front of the building. Shortly thereafter Newcomb went to his vehicle, removed a small box therefrom, and returned to Precision Products. At approximately 9:45 A.M. Brining arrived, the door was unlocked, and Brining entered the building. Twenty minutes later Newcomb left the building, leaving the door ajar, and walked to the mail box, whereafter he returned to the building. [R. T. p. 16, line 20, to p. 20, line 20.]

Thompson then went to a telephone booth and called the United States Attorney and gave him the facts so they could prepare an affidavit and take it to the Commissioner to see if a search warrant could be issued. No arrangements had been made as to how the warrant would be picked up or delivered to Thompson in the event it would have been issued. It was decided by the agents that they would keep the building staked out and leave everything alone unless it appeared that the people inside were going to *permanently* move out and not be expected to return. [R. T. p. 21, lines 2-9; p. 65, line 6, to p. 66, line 22.]

It was during this telephone conversation that Newcomb was arrested by agent Sheridan. Weaver testified that Newcomb came out and put an object on the passenger side of the vehicle and then got into the driver's side of the vehicle. Horn was stationed at the rear of the building. Weaver and Sheridan rushed up to the car and Sheridan placed Newcomb under arrest, handcuffing him in the vehicle. None of the agents checked the material on the front seat of the vehicle prior to entering the premises. Weaver then tried the front door by rattling it, and did not knock

nor announce that he was a federal officer. He then went back to Newcomb to obtain the keys for the purpose of entering, when Brining pushed the drapes aside to look out of the window. Thereupon, he broke down the door and entered the premises, with agent Horn following behind him, having come from his position at the rear of the building. [R. T. p. 184, line 10, to p. 188, line 23; p. 195, lines 15-24; p. 199, line 7, to p. 201, line 24.]

Brining was seated at a desk in the front office, and was placed under arrest by agent Horn. [R. T. p. 172, lines 4-24.]

None of the agents had bothered to look through the high rear window adjacent to the alley entrance prior to entering the building.

When Newcomb was out on the parking lot in his vehicle there was no illegal activity of any kind. [R. T. p. 211, lines 5-8.]

Upon entering the building they entered the front office portion and were unable to see what was in the rear of the premises because of the partition and the doors. It was not until they unlocked the darkroom door in the rear portion of the premises that they found anything of an illegal nature. It was necessary for agent Horn to use either a screwdriver or knife to gain entrance to the darkroom [R. T. p. 209, lines 4-25; p. 212, lines 6-21; p. 191, lines 9-19], whereupon the contraband was discovered.

#### **Assignment of Error and Argument.**

The evidence introduced against appellant was obtained as a result of an unlawful search and seizure, not incident to a valid arrest, and should have been excluded from evidence.

Appellant incorporates by reference as though fully set forth herein the Memorandum of Points and Authorities filed with the trial court. [1 C. T. pp. 20-22.]

The requirement for a warrant to conduct a search stems not only from the Fourth Amendment to the United States Constitution, but also from Rule 41 of the Federal Rules of Criminal Procedure.

In the instant case it was stipulated that the federal agents had neither a warrant for the arrest of Newcomb nor a warrant to search the premises.

According to the doctrine of *United States v. Jeffers*, 342 U. S. 48, 72 S. Ct. 93, in order to justify a search being made without a warrant exceptional circumstances must exist and then the burden is on those seeking the exemption to show the need for it.

Appellant respectfully urges that the government has not established probable cause for the arrest and the accompanying search. What constitutes probable cause is, of course, largely a factual matter. Appellant will not belabor the point by a repetition of the facts heretofore set forth, but stresses their inadequacy to establish probable cause.

First of all, the government refused to reveal the identity of the informant on the basis that he was a reliable informant. [R. T. p. 25, line 23, to p. 26, line 7.] After extensive cross-examination the government conceded he was not a reliable informant but merely a "tipster". [R. T. p. 49, lines 12-17.] Appellant was precluded from any further inquiry as to the identity of the tipster or the information supplied by him to the federal agent.

All of the information, other than his conclusion regarding counterfeiting, concerned the occupations,

residences, place of business, type of vehicles and former criminal records. These factors could easily be supplied by *anyone* even slightly familiar with the appellant. Practically everyone in society has an occupation, a place of business and a residence. The additional item of a criminal record is of little consequence. The information supplied by the "tipster" is not sufficiently substantial to overcome the requirement of disclosure.

*Costello v. United States*, 298 F. 2d 99;

*Cochran v. United States*, 291 F. 2d 633;

*Roviaro v. United States*, 353 U. S. 53, 77 S. Ct. 623.

The evidence apart from the communication of the "tipster" obtained by the agents consisted entirely of acts which were not illegal. In fact, at the very moment of the arrest of Newcomb the government agent who arrested him stated he observed no illegal activity of any kind. [R. T. p. 211, lines 5-8.]

The fact that probable cause did not exist at the time of the arrest is emphatically demonstrated by the testimony of the agent in charge, Kenneth Thompson. In his own mind he knew that he did not have a sufficient basis for arresting Newcomb, so he telephoned a United States Attorney to see if a warrant could be obtained from the Commissioner. Thompson had instructed the agents to make no moves unless the people inside were going to *permanently* move out and not be expected to return. [R. T. p. 21, lines 2-9; p. 65, line 6, to p. 66, line 22.] While Thompson was attempting to go through proper legal channels, two of the officers, Weaver and Sheridan, *in his absence*, became overzealous and impulsively made the arrest, along with breaking the door down. It is difficult to conceive

of a clearer example of impatience on the part of law enforcement officers with proper and constitutional, although admittedly inconvenient, procedure.

In the rather extensive arguments in the trial court this aspect was brought up in appellant's argument, and yet *the government was unable to answer it*. Appellant again raised the issue at the conclusion of the government's argument, providing a further opportunity to the government to do. It still went unanswered. [R. T. p. 269, line 13, to p. 270, line 2.]

*Johnson v. United States*, 333 U. S. 10, 68 S. Ct. 367, held that where there was no suspect fleeing or likely to take flight, nor evidence or contraband being threatened with removal or destruction, and the search was of a permanent building as contrasted with a movable vehicle, plus the fact that the evidence seized would not have perished from the delay of getting a warrant, show that exceptional circumstances did not exist to justify a search without a warrant.

### Conclusion.

Wherefore, in view of the foregoing, Appellant respectfully requests that the Judgment of Convictions on all counts be reversed and that said charges against him be ordered dismissed.

Respectfully submitted,

PAUL AUGUSTINE, JR.,

*Attorney for Appellant.*





### Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL AUGUSTINE, JR.  
*Attorney for Appellant.*

